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5 **UNITED STATES DISTRICT COURT**
6 **DISTRICT OF NEVADA**

7 SIKIA SMITH,

8 *Petitioner,*

9 vs.

10 STATE OF NEVADA,

11 *Respondent.*
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3:11-cv-00420-LRH-RAM

ORDER

14 This *pro se* prisoner matter comes before the Court for initial review. Petitioner has presented
15 only a form motion for appointment of counsel and for an evidentiary hearing in a habeas case. He has
16 not paid the filing fee or submitted an application to proceed *in forma pauperis*. He has not filed a
17 habeas petition.

18 Petitioner's papers are subject to multiple substantial defects.

19 First, petitioner did not either pay the filing fee or submit an application to proceed in forma
20 pauperis. Petitioner first must satisfy the filing fee requirement or obtain leave to proceed *in forma*
21 *pauperis* in order to commence a habeas action in federal court.

22 Second, petitioner did not file a habeas petition. Petitioner may not commence a habeas matter
23 by simply filing a motion for appointment of counsel. The Court will not appoint counsel to prepare
24 an original petition for petitioner, particularly based upon a form motion for appointment of counsel.

25 Third, petitioner did not name his physical custodian as respondent. Under 28 U.S.C. § 2242
26 and Habeas Rule 2(a), the petition must name the officer who has custody of the petitioner as
27 respondent. The Court does not have jurisdiction unless the physical custodian is named as respondent.
28 *See, e.g., Rumsfeld v. Padilla*, 542 U.S. 426, 124 S.Ct. 2711, 159 L.Ed.2d 513 (2004).

1 Fourth, petitioner may not proceed against the sole respondent named, the State of Nevada. The
2 state sovereign immunity recognized by the Eleventh Amendment prevents petitioner from proceeding
3 directly against the State in federal court even in a habeas action, as state sovereign immunity applies
4 regardless of the relief sought. *See, e.g., Pennhurst State School & Hospital v. Halderman*, 465 U.S.
5 89, 100-01, 104 S.Ct. 900, 908, 79 L.Ed.2d 67 (1984). The Court does not have jurisdiction over a suit
6 against the State.

7 Given the multiple defects presented, the action will be dismissed without prejudice. The Court
8 notes that no claims are contained in the papers presented to which to relate back. Accordingly, the
9 dismissal of this matter without prejudice will cause no additional prejudice to petitioner vis-à-vis the
10 running of the federal limitation period, even in the event that any time is left in the limitation period.
11 A one year federal limitation period applies to a federal habeas petition under 28 U.S.C. § 2244(d)(1).
12 The Court expresses no opinion as to the application of the federal one-year time bar to any claims
13 presented by petitioner in a later, properly-commenced action. The pendency of this action has not
14 stopped the running of the federal limitation period. The present papers – which contain no claims –
15 would not stop the running of the federal limitation period even if the Court were to hold this action
16 open rather than dismiss without prejudice.

17 IT THEREFORE IS ORDERED that this action shall be DISMISSED without prejudice to a
18 properly commenced new action.

19 IT FURTHER IS ORDERED that a certificate of appealability is DENIED, as jurists of reason
20 would not find a dismissal without prejudice of the defective papers presented to be debatable or wrong.

21 The Clerk shall send petitioner two copies each of a pauper application for a prisoner and a
22 noncapital Section 2254 form along with one copy of the instructions for each form.

23 The Clerk of Court shall enter final judgment accordingly, dismissing this action without
24 prejudice.

25 DATED this 20th day of June, 2011.



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28 LARRY R. HICKS
UNITED STATES DISTRICT JUDGE